

LYNCH ICHIDA THOMPSON KIM & HIROTA

TIMOTHY J. HOGAN 5312-0
1132 Bishop Street, Suite 1405
Honolulu, Hawaii 96813
Tel. No. (808) 528-0100
Fax No. (808) 528-4997
Email: tjh@loio.com

Attorney for Plaintiff
WAYNE BERRY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

WAYNE BERRY, a Hawaii citizen;) Civ. No. CV03 00385 SOM-LEK
Plaintiff,) (Copyright)
vs.)
HAWAIIAN EXPRESS SERVICE,) **DECLARATION OF**
INC., a California corporation; et al.) **TIMOTHY J. HOGAN; EXHIBITS**
Defendants.) **“1” TO “11”**

)

DECLARATION OF TIMOTHY J. HOGAN

I, TIMOTHY J. HOGAN, am an attorney licensed to practice before all the courts of the State of Hawaii and I hereby respectfully submit this declaration under penalty of perjury. All the statements herein are true and correct to the best of my knowledge, information and belief. If called upon to testify regarding the

matters herein, I am qualified and willing to do so.

1. Attached hereto as Exhibit "1" is a true and correct copy of a query that was produced in discovery by Mark Dillon.
2. Attached hereto as Exhibit "2" true and correct excerpt from the Declaration of Wayne Berry filed previously on June 8, 2005.
3. Attached hereto as Exhibit "3" is a true and correct excerpt from the Declaration of Wayne Berry filed previously on June 8, 2005.
4. Attached hereto as Exhibit "4" is a true and correct copy of Fleming's response to Plaintiff's Second Request for Production of Documents to Defendants Fleming Companies, Inc.
5. Attached hereto as Exhibit "5" is a true and correct copy of an excerpt from the Deposition of Mark Dillon taken in this proceeding on December 23, 2003.
6. Attached hereto as Exhibit "6" is a true and correct excerpt from Fleming Companies, Inc.'s Memorandum in Support of its Motion Under Rule 56(f) for Continuance of Response and Hearing Dates Applicable to Plaintiff Wayne Berry's Motion for Summary Judgment Against All Defendants filed on or about April 27, 2005.
7. Attached hereto as Exhibit "7" is a true and correct copy of an email I obtained from the Guidance images ordered produced from the PCT.

8. Attached hereto as Exhibit "8" is a true and correct copy of an email I received from Damian Capozzola on February 6, 2006.

9. Attached hereto as Exhibit 9 is a true and correct copy of screen prints I made of files recovered from the file Unallocated Cluster contained in the materials that were produced by the Fleming-PCT on January 25, 2006. The first page contains a list of database files that WinHex an off-the-shelf forensic recovery tool captured. The pages following the first page are screen prints of copies of the Berry Freight Control System.mdb that were recovered. Each copy contains a splash screen of the Switchboard that was modified by Mark Dillon when he put the name of Fleming Logistics in the software. These files were recovered from one of the unallocated clusters that had been withheld by counsel for the PCT and C&S Lex Smith on grounds that have never been disclosed. These files were recovered with a copy of WinHex that is an off the shelf forensic recovery program. Ten individual copies are attached to the first page that shows the ten copies of Mr. Berry's FCS.

10. Attached hereto as Exhibit "10" is a true and correct screen print of a Windows File Explorer search of the materials that were produced on January 25 and 26, 2006 by the Fleming-PCT of copies of Mr. Berry's original FCS that were modified during the period after April 1, 2003 and then re-copied to the Fleming servers. Fleming had no license to make such modified copies or any copies at all

of this software during this period.

11. Attached hereto as Exhibit "11" is a true and correct report I generated from the Access tool "Total Access Detective" that performed a comparison between the file that Mr. Capozzola and Mr. Smith represent was the copy Mr. Capozzola obtained from Mark Dillon in May 2003 and the actual copy of the Berry FCS Logistics Data.mdb that has been produced to the defendants in this case. It operates almost as easily as a WordPerfect document compare. Among the over 6,000 differences detected by this program are approximately 1,200 date variations. I have not had time to make a more complete count of these variations. This still leaves well over 3,000 unauthorized changes.

12. In regard to the software that was produced on Tuesday February 7, 2006, purporting to be the copy that Mr. Capozzola withheld and stored in Chicago, I have requested from Mr. Smith and Capozzola in repeated emails that they provide me a copy of the shipping documents to prove it came from Chicago and they have refused.

DATED: Honolulu, Hawai'i, February 10, 2006.

/s/ Timothy J. Hogan
TIMOTHY J. HOGAN
Attorney for Plaintiff WAYNE BERRY